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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1648

IGOR A. IVANOV, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONER'S REPLY MEMORANDUM

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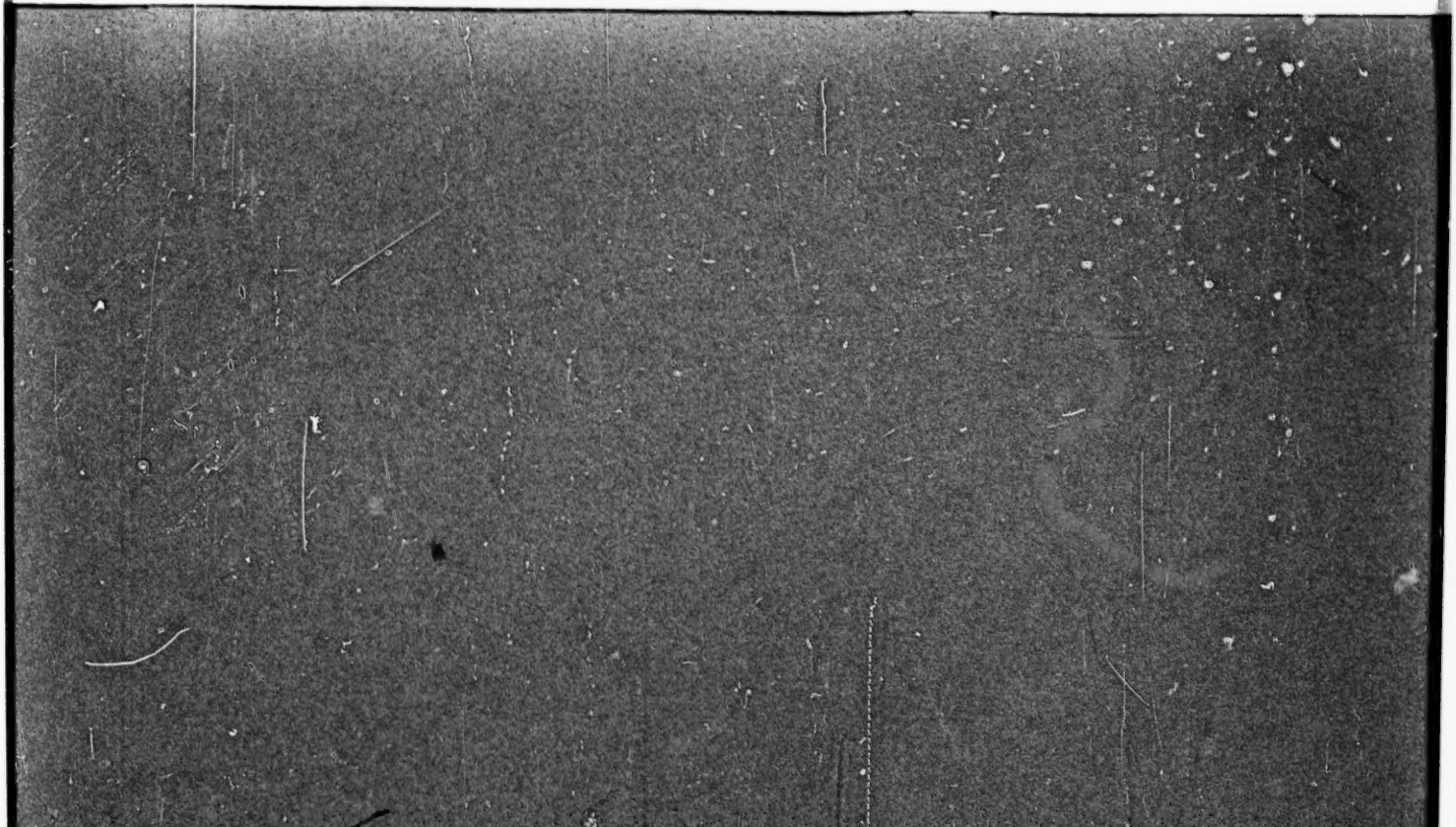

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PETITIONER'S REPLY MEMORANDUM

We submit this Memorandum to oppose the limitation which the Government would place upon a certiorari grant (Gov. Mem. at p. 21).

The Government's Memorandum agrees that certiorari should be granted on the first of the questions presented, which relates to the constitutionality of warrantless eavesdropping for the alleged purpose of gathering foreign intelligence information. (Gov. Mem. at pp. 9, 21.) Similarly, the Government does not oppose certiorari on the second of the questions presented in the Petition, which concerns the applicability of § 605 of the Federal Communications Act of 1934 to the wiretaps of petitioner's conversations. The

Government correctly points out that review of this second question is necessary because:

> "Before reaching the important question of the admissibility in evidence of the fruits of warrantless foreign intelligence electronic surveillance, the Court must first consider petitioner's contention (Pet. 21-22) that the interception and divulgence of his telephone conversations violated Section 605 of the Communications Act of 1934, 47 U.S.C. 605." (Gov. Mem. at p. 15.)

The same rationale upon which the Government accepts the need for certiorari on question number 2 presented in the Petition, we submit should also be applicable to questions 3 through 6, which the Government asks be excluded from a certiorari grant. (Gov. Mem. at p. 21.) For the resolution in petitioner's favor of the issues presented in any of questions 2 through 6 may ultimately make it unnecessary to reach and resolve the difficult constitutional issue presented in question number 1. *Cf. United States* v. *United States District Court,* 407 U.S. 297, 340 (concurring opinion of Justice White).

This alternative is particularly clear with respect to the issue presented by question number 5: whether the Solicitor General in the prior proceedings in this Court has made a binding concession of the illegality of the electronic surveillances of petitioner's conversations. The Government discusses this issue only in a footnote to its Memorandum (Gov. Mem. at pp. 12-13, n.11), where it carefully avoids taking a position as to whether a concession of illegality was made at the oral argument herein on October 14, 1968. One member of this Court, however, concurring in a subsequent case, expressed the position (a) that the Solici-

tor General's argument contained such a concession and (b) that the Court in *Ivanov* had declined to accept the proferred concession. *Giordano* v. *United States,* 394 U.S. 310, 313-314, n.1 (concurring opinion of Justice Stewart). Should a majority of this Court agree with the *Giordano* concurrence as to (a) but disagree as to (b), then the Court may conclude that the constitutional issue need not be reached herein because, for purposes of this case, it has been conceded.

The resolution of question 3 presented in the Petition would likewise make it unnecessary to reach the Fourth Amendment issue raised by question 1. Petitioner's contention under question 3 is that, since § 605 would undoubtedly have been construed at the time of petitioner's indictment in 1963 to exclude wiretap evidence from his trial, the Government's action in concealing the existence of the wiretaps from court and counsel for five years should not entitle it to some more favorable interpretation of § 605 after the belated disclosure. The Government's response on this point is to imply that Attorney General Kennedy was in error in telling Congress in 1962 that evidence derived from wiretaps approved by the Attorney General cannot be used in espionage cases. (Gov. Mem. at pp. 17-18, n.18; Attorney General Kennedy's statement is quoted at p. 23 of the Petition.) [1] But Attorney General Kennedy's position on this question accorded with that of his predecessors, including Attorneys General Rogers and Brownell upon whose analysis

[1] Although the Government now characterizes Attorney General Kennedy's statement as a request for "more explicit surveillance authority from Congress" (Gov. Mem. at n.18), he was in fact asking Congress for a repeal of the then-recognized statutory prohibition against using the fruits of wiretapping in criminal prosecutions. The Congress did not accede to such request until 1968.

the Government's Memorandum relies. (See Pet. App. 52a-54a; Gov. Mem. at 15, n.14 and 16, n.15.) It is implausible to suppose that an Assistant United States Attorney prosecuting this case in 1963 would have taken a contrary position.[2]

Question 4 of the Petition is addressed to the Government's conceded failure to disclose to the District Court upon remand the post-verdict wiretaps which it had obtained of Ivanov's conversations. The Government correctly points out that petitioner has a remedy under 28 U.S.C. § 2255 with respect to this claim. (Gov. Mem. at 21, n.21.) But institution of such a collateral attack would add months more to this litigation, which has already continued for 11 years since indictment and 10 years since conviction. Since the Government's withholding of these wiretaps of Ivanov's conversations was at least arguably violative of this Court's mandate on remand, and plainly violative of the District Court's orders in the remand proceedings (cited at Pet. 25-26), consideration of the issue at this juncture would seem the more appropriate course.

The sixth question presented, if resolved in petitioner's favor, would result in a new trial because of the Government's failure to show that Ivanov's conviction was untainted by the concededly unlawful bugging of Ivanov's home. This would make it unnecessary to determine (under question 1) the legality of the wiretaps authorized by the Attorney General at other locations. Resolution of the issue turns not upon a detailed factual review but upon definition of the applicable burden of proof. The Government rested

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[2] However, the prosecutor never faced the issue because, as he testified, the FBI agents never revealed to him that there had been any electronic surveillance of Ivanov. (See R. 911a.)

without offering any evidence of an independent source, and if the applicable burden of proof rule be defined to require evidence of independent source, reversal here is required. Defining the applicable burden of proof poses a question of major importance, affecting all post-*Alderman* cases, which merits review quite apart from any consideration of avoiding other constitutional issues.

The seventh and last of the questions presented in the Petition, we agree, would not have to be decided at this juncture. (See Gov. Mem. at 18, n.19.) It concerns the applicability of the restrictive disclosure procedures prescribed by 18 U.S.C. § 3504, if the wiretaps herein are held illegal. This question will inevitably arise upon any remand which this Court orders, and if not already resolved here, would further prolong the litigation. Moreover, if § 3504 is held applicable (though petitioner would urge the contrary), this limitation upon disclosure of illegally overheard conversations may bear upon the consideration of other national security contentions advanced by the parties.

Respectfully submitted,

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Dated: October, 1974